Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72- 72-1274

BRUCE W. STILSON and VALERIE STILSON,
on behalf of themselves and all others similarly situated,
Petitioners,

versus

THE READER'S DIGEST ASSOCIATION, INC., a Delaware corporation, READER'S DIGEST SERVICES, INC., a Delaware corporation, READER'S DIGEST BOOKS INC., a Delaware corporation and READER'S DIGEST SALES AND SERVICES INC., a Delaware corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
(FIRST APPELLATE DISTRICT)

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ABBREVIATIONS FOR REFERENCES

References to the Appendix to this Petition: 1a 2a, etc.

The abbreviations used in this Petition for references to the certified original record filed in this court are as follows:

CT	-Clerk's Transcript on Appeal from an Order of the Superior Court of the State of California, in and for the County of Marin
RT	-Reporter's Transcript of Proceedings, November 6, 1970, in the Superior Court, County of Marin
Frankel Dep.	-Deposition of Robert Frankel
AOB	-Appellants' Opening Brief in the Court of Appeal
RB	-Respondents' Brief in the Court of Appeal
ACB	-Appellants' Closing Brief in the court of Appeal
Pet.Reh.	-Petition for Rehearing in the Court of Appeal
Ans.Pet.Reh.	-Answer to Petition for Rehearing in the Court of Appeal
Pet.Hrg.	-Petition for Hearing by the Supreme Court of California
Ans.Pet.Hrg.	-Answer to Petition for Hearing by the Supreme Court of California

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Unless otherwise indicated, all emphasis is supplied.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-

BRUCE W. STILSON and VALERIE STILSON, on behalf of themselves and all others similarly situated,
Petitioners,

versus

THE READER'S DIGEST ASSOCIATION, INC., a Delaware corporation, READER'S DIGEST SERVICES, INC., a Delaware corporation, READER'S DIGEST BOOKS, INC., a Delaware corporation and READER'S DIGEST SALES AND SERVICES, INC., a Delaware corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA (FIRST APPELLATE DISTRICT)

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California (First District) entered in this case.

CITATION TO THE OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is reported at 28 C.A.3d 270 (1972) and 104

Cal. Rptr. 581 (1972) and reproduced *infra*, 2a-7a. The decision of the Superior Court of Marin County (the trial court) is unreported, but such rationale as there is in that decision is reproduced *infra*, 8a-9a.

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed and of its entry is October 25, 1972; a petition for rehearing was denied November 25, 1972. Petitioners, as required by this Court, sought discretionary review by the highest court of California (the Supreme Court) of the judgment as to which it seeks review (Pet.Hrg. 1). The Order denying a hearing was entered December 20, 1972 (104 Cal.Rptr. 581). A certified copy of that Order is included in the Record filed with this Court. This Petition is timely filed. 28 U.S.C. § 2101 (c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Does it constitute a denial of due process for a state court to refuse to grant some relief admittedly due on the ground that since it cannot conveniently determine the entire case it will refuse to entertain the case at all?

2. May the amount of expected monetary recovery arising from an acknowledged legal wrong be used, consistent with due process, to determine *not* to allow a class of injured persons to seek other than monetary relief, such an accounting for wrongfully obtained prof-

its or an injunction against continued wrongful actions?

3. May a court Constitutionally determine and assume the facts which control the propriety of a class action without an evidentiary hearing when the facts are disputed?

4. Can a state court Constitutionally bar a class of claimants from seeking relief for an acknowledged legal wrong because the prospective monetary recovery does not justify the expected expenditure of court time?

5. May a court require notice to and approval from each class member before *any* order affecting his rights may be made?

6. May a state court Constitutionally entertain a multi-state or nationwide class actions, i.e. an action where many plaintiffs reside and were injured in other than the forum state?

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7. Is the unconsented commercial exploitation of a person's identity an invasion of the Constitutional right of privacy?

So far as Petitioners have been able to determine, neither these important procedural class action questions of due process nor the issue of whether the unconsented exploitation of identity for commercial pur-

poses is an invasion of the Constitutional right of privacy have ever been raised before this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves, as a matter of due process, the Fourteenth Amendment to the United States Constitution. The case also involves the Bill of Rights of that Constitution as interpreted by this Court to embody a Constitutional right to privacy (e.g., the Fourth, Ninth, and Fourteenth Amendments). Relevant portions of those Amendments are set forth *infra*, 10a.

STATEMENT OF THE CASE

The fundamental facts giving rise to Petitioners' cause of action are undisputed (AOB 5-7; RB 3-4; ACB 1). Respondents seek to sell their products through computer-programmed direct mail promotions. The promotional materials seek to sell subscriptions to *Readers Digest* or membership in the *Readers Digest Condensed Book Club*. The materials are personalized by computer controlled "typewriters" (IBM 1403-N1 equipment) to include, immediately after the salutation to the prospect, at their very beginning, the names of two other *real persons* who are identified as fellow members of the prospect's community. These identities are exploited in promotional materials sent to two other persons in the community. The computerized personalization is the *critical* characteristic of the promotion.

An extract illustrating this exploitation by person-

alization is photographically reproduced *infra*, 1a (a complete computer letter is reproduced at CT 17-21).

The class consists of those persons whose identities were exploited, without their consent, in attempts to sell Respondents' products. This format was repeated an unknown number (*presumably* millions) of times, exploiting (*presumably*) millions of identities, in all of the United States except Hawaii and Alaska (CT 53-54).

Respondents admit the unconsented exploitation for commercial purposes of the identities of class members (RT 2:11-20; 37: 3-4) but claimed, and continued to claim, a *right* to do so, not limited by common, statutory or Constitutional law (RT 2, 6-8; RB 6-8; Ans.Pet.Reh. 4; Ans.Pet.Hrg. 1, 3, 6).

Petitioners commenced a class action stating three causes of action: (1) unconsented use of identities for commercial purposes; (2) invasion of privacy; and (3) implied promise to pay the value of the identities taken (CT 1-7).

The complaint sought, *inter alia*, an injunction against continued unconsented use of Petitioners' identities; damages; and an accounting of Respondents' profits attributable to the wrongful use of those identities (CT 8-9).

Petitioners, as soon as allowable under California procedure, sought to discover (Interrogatories, CT 26-34) and prove (Request for Admissions of Fact, CT

10-25) facts about class member characteristics and class parameters, including facts which would demonstrate the predominant and overwhelming number of common questions of fact and law present, the numerosity of the class and the typicality of the representative parties' interests.

These facts (except the lack of consent by those whose identities were exploited) *were all within the private knowledge of Respondents, discoverable nowhere else and admittable by no one else.*

All discovery and proofs through interrogatories and requests for admissions was prevented by the Trial Court, at Respondents' request (CT 65-68, 73-74, 82-83).

Respondents moved to strike the class allegations and demurred on grounds that did *not* admit the allegations of the complaint, a procedural device that resulted in factual findings without an evidentiary hearing.

Upon finding that Respondents would not reveal whether or not they planned to stop the exploitation (Frankel Dep. 73: 7-13) and that the promotions were continuing (RT 37-39), Petitioners moved for preliminary injunctions restraining Respondents from (1) modifying or destroying records which would aid identification of class members and (2) continuing the unconsented exploitation of the identities of class members (CT 86-96).

After oral argument, but without an *evidentiary* hearing (RT 1-60), the trial court (1) granted Respond-

ents' motion to strike Petitioners' class allegations; (2) sustained Respondents' demurrers to class allegations; and (3) denied both of Petitioners' motions for preliminary injunctions (8a-9a; CT 134-136). Respondents' opposition to Petitioners' motions for preliminary injunctions was based on a self-serving conclusory affidavit (CT 127-132).

The trial court's order was appealed (see, generally, AOB, RB, ACB) and affirmed by the Court of Appeal (*infra*, 7a); a rehearing by the Court of Appeal was denied (Pet.Reh.; Ans.Pet.Reh.).

The Supreme Court of California denied a hearing (104 Cal.Rptr. 581).

Petitioners raised the issue of the Constitutional right to privacy before the trial court (CT 103, 105); before the Court of Appeal (CT 103, 105; Pet.Reh. 4) and in petitioning the Supreme Court of California for discretionary review (Pet.Hrg. 17-18).

The matter of denial of procedural due process did not arise until the Court of Appeal rendered its opinion holding the class of "millions of unnamed plaintiffs" had claims too small to obtain access to the California courts (*infra*, 5a-6a) and any injunctive relief for the class impossible without prior notice to each class member (*infra*, 7a).

ARGUMENT

I. The California Courts Have Deprived The Class of Due Process of Law by Failing to Allow Any Opportunity To Seek Any Monetary Recovery or Any Opportunity to Preserve Their Intangible Rights of Privacy by Preventing the Commercial Exploitation of the Identities of Class Members.

A. *Introduction*

This action could not have been brought in a United States Court. Class actions cannot be maintained in a United States Court absent a Federal cause of action except in a diversity action where *every* class member has a minimum claim of $10,000.00. *Snyder v. Harris,* 394 U.S. 332 (1969). It has specifically been held that an individual claim identical to those of the class members in this case could not reach the $10,000.00 minimum. *Bourhis v. "Readers Digest" Association,* 330 F.Supp. 319 (N.D. Cal. 1971). Therefore, if state courts do not provide procedures for handling cases such as this one, there will be *no* relief for similarly injured classes.

A collateral question presented by this case is whether or not a state court with personal jurisdiction over a defendant can Constitutionally entertain a class action reaching beyond its borders, i.e. an action in which the class members reside, or were injured in, states other than the forum state. In this case, this question has been decided, by implication, in favor of the legality of a nationwide class action. Petitioners know

of no direct holding on the question; the trial court in this case had its doubts (*infra*, 8a-9a; CT 140). The resolution of this question has broad implications concerning the efficient administration of justice, utilization of courts and uniformity of decisions. If there is a nationwide wrong, must class members bring 50 actions to obtain complete relief? Must a defendant defend against 50 actions?

B. *The Procedure Followed By The Courts Below Effectively Deprived Petitioners of an Opportunity to be Heard.*

The *only* sources for all factual determinations made by the lower courts were the declarations of Stilson, Stoke and Shoup for Petitioners (CT 86-94) and the two affidavits and the deposition of Frankel for Respondents (CT 52-64, 127-132). Because the facts regarding Respondents' own acts were particularly within Respondents' own knowledge, the refusal of the trial court to allow discovery (CT 82-83) foreclosed Petitioners from presenting additional evidence or challenging Respondents' factual assertions.

While proceeding by affidavit and without the right of cross-examination is acceptable in testing pleadings, because the pleadings attacked are *assumed* true and *only* their *legal adequacy* is considered (see, e.g. *Daar v. Yellow Cab Co.*, 67 Cal.2d 695 (1967); *Vasquez v. Superior Court*, 4 Cal.3d 800 (1971)), such procedure is a denial of due process where a party may be prejudiced by a decision on factual matters. Although the motions made and argument had regarding the appro-

priateness of a class action were directed only to the pleadings (a motion to strike and special demurrers attacking the complaint), the decisions made were based on *contested* factual considerations. Essential allegations of Petitioners' complaint were found false (e.g., the allegations that there are common questions of law and of fact) and Respondents' claims (e.g. the alleged size of the class and their inability to reconstruct the mailing list) were found true.

The trial court denied a class action because "Fundamentally the claim for relief consists of the aggregate of the claims of the individual members of the class, each one of which depends for its validity upon separate and unique facts (*infra*, 8a).

The Court of Appeal's denial of a class action was based entirely on *assumptions* regarding class size, its geographical distribution, assumed individual desires of class members, and claims by Readers Digest regarding its alleged inability to reproduce the names of the class.

At no time has any court said Petitioners' pleadings were inadequate, or, if inadequate, not correctable by amendment.

Respondents claim that the proceedings before the trial court constituted a factual hearing (Ans.Pet.Reh. 2; Ans.Pet.Hrg. 8). If it was, Petitioners were unduly restricted in presenting their case; if it was not, the courts below should *not* have made critical factual

findings. In either event, Petitioners were deprived of a "meaningful opportunity to be heard".

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court said:

> Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims for right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "wherever one is assailed in his person or his property, there he may defend" (citing cases) (401 U.S. at 377).

C. *The Assumptions the Appellate Court Approved Would Foreclose Any Meaningful Hearing of Any Class Action.*

The assumptions indulged in by the Court of Appeal violate all existing concepts of law in cases involving group relief. The Court of Appeal said:

> The right to a remedy does not imply a duty to seek it. It cannot be assumed that each of the millions in the class objects to such use of his name, and injunction would hardly be granted absent some desire for it by each supposed beneficiary. (*infra*, 7a).

Petitioners agree that it is perhaps true that not all members of the class object to Respondents' exploitation of their names. It is equally true that all racial minorities do not seek integration, nor do all inner city residents favor busing. Must orders regarding such matters await individual statements of approval by *each* of those affected?

In *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1967), the Court said:

> Necessarily a different situation is presented where absent class members inform the court of their displeasure with plaintiff's representation, ... but *the representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate. Nor can silence be taken as a sign of disapproval.* (391 F.2d at 563).

The comments of Judge Weinstein are also appropriate:

> A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights. Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 *Buffalo L.Rev.* 433, 460 (1960).

Yet in this case, to date, a class action has been denied for that reason.

D. *The Decision Below Effectively Prevents Class Claimants with Small Dollar Claims from Obtaining Access to Any Court*

The opinion of the Court of Appeals states that the members of the class would be entitled to nominal damages of 1¢ to $1.00 each "on little more than election to proceed" (*infra*, 4a). Paradoxically, this case failed and no nominal damages were awarded because the class members were entitled to more. The Court of Appeal said that the trial court would have to consider evidence of the "mental" and "subjective" state of each class member who sought more than nominal damages, that this would foist an intolerable burden on the judicial system, and, going even further, said that: "... the mere nominal damages to be recovered by even a large number cannot warrant such an imposition." (*infra*, 5a).

Eleven separate forms of relief are sought in the prayer for relief (CT 8-9). The first form prayed for is an injunction against exploiting the identities. The second form prayed for is an accounting of profits. Only three of the eleven forms of relief sought damages of the type forming the rational for dismissal by both Courts below. The Court of Appeal's reasoning, although applied to the *entire* case, has *no* logical relevance either to the injunctions sought against destroying records and exploiting individual identities or to the request for money based on an accounting of profits, or to punitive damages (which could have been distributed by a "fluid class recovery", approved in *Eisen*

v. Carlisle & Jacquelin, 52 F.R.D. 253, 264-265 (S.D. N.Y. 1971)), or to attorneys' fees of court costs.

The Court of Appeal is saying that it is an intolerable burden on any court to hear evidence on a small claim which will result in a small recovery. If a court cannot be required to hear one million witnesses seeking $1.00 each, why should it be required to hear one witness seeking $1.00? The proportionate burden is equivalent. Where do you draw the line? The practical likelihood of a multitude of witnesses with $1.00 claims appearing, is, of course, negligible.

The practical result of the decision below is *not* the salutary result of preventing courts from being packed with claimants seeking nominal damages and hearing lengthy testimony about the subjective impact of the Readers Digest promotion, but, rather, the *unfortunate* result of approving the commission of wrongs massive in the aggregate if, individually, of less monetary value than the filing fee required to obtain a hearing on a single claim.

A not altogether facetious argument may be made that the ruling of the California courts deprives potential wrongdoers of equal protection of the law; only those users of direct mail with the equipment and resources sophisticated enough to enable them to commit their wrongs on a basis which is individually too small to be legally cognizable may benefit from proven sales techniques. Ironically, those entities are, of course, the largest mailers.

The result in this case is the exact opposite of that of *Ratner v. Chemical Bank New York Trust Company*, 54 F.R.D. 412 (S.D.N.Y. 1972), which held that a class action need not be allowed where a statute provides for a *minimum* recovery of $100 plus attorney fees, and thus a sufficient incentive for individual actions. In this case, the result is that a small *maximum* recovery for each class member makes no court available for a class action. Such a holding prevents access to the courts for victims of class wrongs in the same degree and by the same method as that eliminated by *Boddie v. Connecticut, supra.* In *Boddie*, this Court held a filing fee requirement could not be used to prevent poor persons from seeking a divorce. In this case, although members of the class are from all walks of life, the requirement of an individual action requires litigation costs in excess of any expected recovery and effectively forecloses any large number of plaintiffs seeking relief. The result is that the wrongdoer keeps the gains from his wrong. Indeed, the wrongdoer can continue his actions without any fear of court intervention or restraint.

II. The Unconsented Commercial Exploitation Of Identity Is An Unconstitutional Invasion Of Privacy

The untrammeled unconsented exploitation of a person's *identity* for profit is an unconstitutional intrusion into privacy. The Reader's Digest exploitative scheme *identifies* each person. Thus, through that identification, the personality exploited is stripped of its anonymity (*infra*, 1a). "... Men fear exposure not only to those closest to them; much of the outrage underlying

the asserted right to privacy is a reaction of exposure to persons known only through . . . other secondary relationships." *Briscoe v. Reader's Digest Association*, 4 Cal.3d 529, 534 (1971).

This Court has held that regardless of the absence of the word privacy from the Bill of Rights, the right is inherent in the Bill. And privacy is no gloss on the Bill. *All* intrusions upon or throttling of the right are disfavored. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891); *Roe v. Wade*, — U.S. ——, 93 S.Ct. 705, 726-727, (1973); *Roe v. Wade, supra, Doe v. Bolton*, —— U.S. ——, 93 S.Ct., 739 756-760 (1973) (Douglas, J., concurring); "... the most comprehensive of rights and the right most valued by civilized men ..." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

> The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system. (*Roseblatt v. Baer*, 383 U.S. 75, 93 (1965) (Stewart, J., concurring)).

The right to freedom of speech guaranteed by the First Amendment (a sometimes competitor of or an adversary to the right of privacy) affords no shield to Respondents here. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942); *Time, Inc. v. Hill*, 385 U.S. 374, 385

fn. 9), 391 (Opinion of Court), 405, 412-413 (Harlan, J., concurring in part and dissenting in part).

In this case, the invasion occurs in a very simple form. The computer controlled invasion sought to be enjoined, though massive in scope, is precise in individual impact.

"... I do say that in these matters of the spirit inroads on legitimacy must be resisted at their *incipiency*. This kind of evil grows by what it is allowed to feed on ..." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1956) (Frankfurther, J., concurring). "It may be that it is the obnoxious thing in its *mildest* and *least repulsive form;* but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure", *Boyd v. United States*, 116 U.S. 616, 635 (1886).

The incipiency, mildness, nominal repulsion, slight deviation described in *Sweezy* and *Boyd, supra*, — *all* are present in this case.

Here the concern is about "intrusions on human dignity by those in possession of *economic* ... power" Havighurst, Forward, 31 *Law & Contemp. Prob.* 251, 252 (1966); This Court has said: "A man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property." *Brown Chemical Co. v. Meyer*, 139 U.S. 540, 544 (1891). Yet, in this case, control of that

"use and enjoyment" has been crushed by raw economic power refined by a computer.

The Reader's Digest has professed concern about these types of acts, but that profession of concern proved no restraint on its use of its giant IBM computers:

> I was at a luncheon a month ago with the editors of the Reader's Digest, who asked me to talk about the item of privacy. During our discussion they provided me with an example of the ease with which the new technology can invade privacy. They were able, through their computer system which contained address lists, to get a firm printout of the names of all the people who lived on either side of the persons who were going to be asked to become subscribers to the Reader's Digest. On this basis they were able to send out letters which said "Dear Mr. Westin, we want you to know that your neighbor Harry Smith, and your neighbor John Jones, subscribe to the Reader's Digest. Why don't you subscribe also? *They got the most surprising return of new subscriptions* ...
>
> ... The Reader's Digest editors were struck by this because they said they didn't want so much power. They were appalled that they were able to affect so many people through such a simple technique. (50 *Hearings on Commercial Credit Bureaus Before a Subcommittee of the House Committee on Government*

Operations, 89th Cong., 2d Sess. (1965) (Dr. Alan F. Westin testifying)).

Editorially, at least, the Readers Digest recognizes both the value of an individual's privacy and apprehension of computer power. See, e.g., "Is Privacy Dying," Readers Digest 93 (October, 1970); "It's Here — The Computer Revolution," Readers Digest 133, 137 (May, 1971).

The Readers Digest may not have wanted power, and it may have been "appalled", but it used the power and claims the Constitutional *right* to perform acts which Petitioners contend are the *unconstitutional* exercise of that "so much power". Petitioners' privacy has been invaded, their identities seized and exploited; even though the California courts showed some awareness of the illegality of Respondent's acts, they failed to halt the acts.

CONCLUSION

Thus far, in this case, the California courts have denied access to the courts by this class because the *class* might be too numerous. This Court has never held that a class can be too numerous. The California courts intimate there can be no class action because the individual wrongs are too small even if the class might be small. This Court has never said that a class action should be denied because any *individual* wrong is "too small". The California courts also say there can be no injunction because there must be identification of each class member *and* notice to each class

member before *any* class relief is given — *even that of a preliminary injunction against an acknowledged legal wrong* — identification and notice being tasks that are too difficult. The California courts have allowed Respondents to retain the profits from their wrongs and have them immune to penalty.

The result of all of this is to close state courts to any class, denying the class due process, on these or similar facts, *regardless* of class size.

All of this has been done *without* an evidentiary hearing or any rational, systematic findings as to the amenability of this action to class treatment. In class actions, a mask of procedure conceals what are *substantive* class rights. These procedural actions of the California courts denying substantive class rights are clear violations of the due process clause of the Fourteenth Amendment. Finally, the acts of Respondents are an unconstitutional invasion of privacy.

The Court of Appeals for the Second Circuit foretold this case in *Escott v. Bar-Chris*, 340 F.2d 731, 733 (1965):

> In our complex modern economic system where a *single harmful act* may result in damages to a great many people there is a particular need for the representative action as a device for vindicating claims which, taken individually, are *too small to justify legal action* but which are of significant size if taken as a group. In a situation where we depend on indi-

vidual initiative, particularly the initiative of lawyers, for the assertion of rights, there must be a practical method for combining these small claims, and the representative action provides that method.

As the trial court stated in this case: "... the community must lie back at the I.B.M. machine where all these things have this in common, that they are all on the *same* tape, being sent all by the *same* company in the same fashion. *There's a community.*" (RT 13).

Petitioners urge that all Questions Presented are ripe for decision by this Court and pray that Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Dear Mr. & Mrs. Stilson:

You and two other members of the Reader's Digest family, Mrs. Lucille Stoke and Mr. Philip C. Strick, are among the people in San Rafael whose names have been selected from a list of U.S. residents to receive a personal Lucky Number "Bankbook" in our new $150,000.00 Springtime Sweepstakes. This book gives you six chances to win any of 14,710 prizes. To be eligible, mail it back to us in the enclosed envelope. It is registered in your name as follows:

Pkg Frankel Ex 1 id.

Mr. & Mrs. Bruce Stilson
1229 Idylberry Rd. 9/18/70 by
San Rafael, CA 94901

Important: If the name and address

(over, please)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

BRUCE W. STILSON, et al.,
Plaintiffs and Appellants,

vs. 1 Civil No. 29743
(Sup. Ct. #57183)

THE READER'S DIGEST ASSOCIATION, INC., et al.,
Defendants and Respondents.

Draper, P. J. — This appeal presents another aspect of the problems in the burgeoning field of class actions. The two named plaintiffs sue on behalf of themselves and all others similarly situated.

It appears from admissions sought by plaintiffs and made by defendants that in 1970 defendants conducted two "sweepstakes" in which they offered substantial prizes. Typed letters, personalized by a computer tape process, were mailed by defendants, enclosing books of tickets or chances on the sweepstakes. The addressees of these letters constitute the class for which this action is brought. In the first drawing, the letter read, in part, "You and two other members of the Reader's Digest family (naming two) are among the people in (name of city) whose names have been selected from a list of U. S. residents to receive a personal Lucky Number 'Bankbook' in our new" sweepstakes. The letter concerning the second "sweepstakes" omitted the

reference to the Reader's Digest family. It said: "Good news for you and other selected residents of (name of city). You — and your fellow townsmen — (naming two) are among those from this area whose names have been selected" etc. Presumably, a like letter, using the name of the earlier addressee, went to each of the two named in it, similarly using plaintiffs' name. Subscription to the magazine was not required as a condition to inclusion of these numbers in the drawing, but it is apparent that the design was ultimately to secure subscriptions. It is also apparent that the name of any one individual was used only in the mailing to him and to two others. The complaint alleges that such use of the name of each plaintiff, named or unnamed in the complaint, was without his authorization.

Although the complaint seeks damages and injunctive relief as to all mailings within the period of the statute of limitations, the only information we have as to numbers is found in the deposition taken by plaintiff of an executive of defendant. This deposition relates only to the two "sweepstakes" of 1970. Deponent's figure, not questioned by either party, is that mailings were made to approximately 21,300,000 persons in the first 1970 drawing, and to approximately 29,000,000 in the second. We have no information as to the percentage of duplication in the two mailings, but it is clear that the "class" numbers from 21 to 50 millions, even if the 1970 mailings were the only ones.

Defendants moved to strike the allegation relating to others than the named plaintiffs. Plaintiffs sought a

temporary injunction. The motion to strike was granted. Plaintiffs appeal.

The unauthorized use of one's name for commercial exploitation is actionable *(Fairfield v. American Photocopy etc. Co.*, 138 Cal. App. 2d 82; Prosser, Privacy (1960) 48 Cal. L. Rev. 383, 401-7). Special damages need not be shown *(Fairfield v. American Photocopy, etc., Co., supra,* p. 89). But a plaintiff is entitled to show special circumstances, including any mental anguish caused to him, in establishing damages in excess of the merely nominal (id., pp. 88-91). The gist of the cause of action here asserted is a wrong "resulting in injury to the feelings;" it "concerns one's own peace of mind;" and the injury is "mental and subjective" *(Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 721).

Plaintiffs-appellants argue that they have met the requirement of showing a "well defined community of interest in the questions of law and fact involved affecting the parties to be represented" *(Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 704).

The authorities cited above articulate the well-established principle of law that one whose name is used for a commercial purpose without authorization has a right to mere "nominal" damages, i.e., 1¢ to $1 each. There may well be little dispute as to absence of authorization by most of the unnamed plaintiffs. Thus, if commercial exploitation be found, they would be entitled to nominal recoveries upon little more than election to proceed. But nominal damages involve only a trivial sum. They " 'are damages in name only, not in fact, * * * the same

as no damages at all' " *(Price v. McComish*, 22 Cal. App. 2d 92, 100). As to such damages, it is the legal principle, and not contested issues of either law or fact, which are common to all in the class. But, as pointed out in *Fairfield,* each such plaintiff has an established right to show the mental anguish, as well as the financial detriment, which may have been caused to him by the use of his name in letters to two other persons. This necessarily would involve evidence of the mental and subjective state of each plaintiff who sought more than nominal damages, and could well concern the status and business relationship to him of the recipients of the letters using his name. To open a California court to the presentation of such evidence by an indeterminable portion of the 21 to 50 million unnamed plaintiffs would foist upon our judicial system an intolerable burden, and the mere nominal damages to be recovered by even a large number cannot warrant such an imposition.

We recognize, of course, the rule that "although ultimately each class member will be required in some manner to establish his individual damages this circumstance does not preclude the maintenance of the suit as a class action." *(Vasquez v. Superior Court*, 4 Cal. 3d 800, 815.) But plaintiffs must "demonstrate that the questions which they will be required to litigate separately are not numerous or substantial" (id., p. 820). "[S]ubstantial benefits resulting from class litigation, both to the litigants and to the court, should be found before the imposition of a judgment binding on absent parties can be justified," *(Daar v. Yellow Cab Co., supra*, 67 Cal. 2d at p. 713).

We note that the trend of authority favorable to class actions *(Vasquez v. Superior Court, supra; Daar v. Yellow Cab Co., supra)* does not vest an uncontrolled discretion in the named plaintiffs and their counsel to represent a class of unlimited size *(see Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374 [hearing den.]; *Los Angeles Fire & Police Protective League v. Rodgers*, 7 Cal. App. 3d 419). Rather, as pointed out in *Daar* and *Vasquez*, there must be some benefit of substance to the parties and the court.

Although an award of but nominal damages to each of the millions of unnamed plaintiffs would impose a heavy penalty upon defendants, it would hardly serve the interest of any plaintiff. Yet to award nominal damages, the court would be required to examine the mental and subjective state of each of the millions of plaintiffs, since in each case such individual appraisal is of the essence of the claim for damages and, indeed, of the cause of action.

At oral argument, plaintiffs advised that if we took this view, they would not object to our limiting the class of plaintiffs to those resident in California at the time their names were used. But, upon the reasonable assumption that defendants' mailings were proportionately distributed over the several states, this would still leave from two to five million plaintiffs whose individual sensitivity and worldly status would have to be separately assessed. We agree with the trial court that this would impose an unjustified and intolerable burden upon the court and the parties.

Appellants also urge, although less strongly, the right to enjoin further like use of the names of the unnamed plaintiffs. But this, too, would present major difficulties for the parties and the trial court. The proposed injunction would apply only to reuse of a name already used. Yet the deposition filed herein contends that the mailings were to names selected by computer from a master tape which is used for day to day business of respondent, including billing and subscription renewal, in addition to solicitation of subscriptions. The advertising mailings were made from tapes run from this master tape, but were erased for reuse before this action was filed. Even if this difficulty could be overcome, the court would have the burden of devising a method of notifying each unnamed plaintiff of the pendency of the action in his behalf. The right to a remedy does not imply a duty to seek it. It cannot be assumed that each of the millions in the class objects to such use of his name, and injunction would hardly be granted absent some desire for it by each supposed beneficiary. Many of the problems which bar relief in damages similarly weigh against issuance of injunctions in behalf of this overbroad class.

We sustain the trial court's determination that the class action claim should be barred.

Order affirmed.

Brown (H.C.), J., and Caldecott, J., concurred.

ORDER RE
SUBMITTED MATTERS

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MARIN

BRUCE W. STILSON and VALERIE STILSON, et al,
Plaintiffs,

versus No. 57183

THE READER'S DIGEST ASSOCIATION, INC., et al,
Defendants.

The Defendants' Special Demurrer to the Complaint and Motion to Strike Portions Thereof together with the Plaintiffs' Motion for Preliminary Injunction, having been heretofore submitted, The Court concludes that the Causes of Action attempted to be set forth by the Plaintiffs are not appropriate for a class action principally for the reason that while undoubtedly common questions of law and fact exist with respect to the claims of members of the class, fundamentally the claim for relief consists of the aggregate of the claims of the individual members of the class, each one of which depends for its validity upon separate and unique facts. The result is that the major issues of basic liability and total damage cannot be determined without the appearance and separate proof of damages by each individual member of the class.

No conclusion is offered on the question of whether the courts of this State can or should entertain legal actions affecting the rights of millions of non residents

in forty-seven other states arising out of operative facts occurring far beyond their territorial jurisdiction.

* * * *

3. Plaintiffs in open court having declined the protection of a Preliminary Injunction for the prevention of further use of their individual names during the pendency of this action, and the class action aspects of this litigation having been stricken, the Plaintiffs' Motion for a Preliminary Injunction is denied.

Dated: This 17th day of November, 1970.

HENRY J. BRODERICK
Judge of the Superior Court

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV:

> "The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . ."

U.S. Const. amend. IX:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

U.S. Const. amend. XIV, §1:

> ". . . nor shall any State deprive any person of . . . liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

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MICHAEL RODAK, JR.,

In the Supreme Court
OF THE
United States

OCTOBER TERM 1972

No. 72-1274

BRUCE W. STILSON, et al., *Petitioners*

vs.

THE READER'S DIGEST ASSOCIATION, INC., a Delaware corporation, et al., *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This case does not present any substantial Federal question. Moreover, the points sought to be raised in this Court were either not raised below or were waived.

The California courts have merely applied their procedural rules governing class actions; there has been no denial of any right of privacy nor a denial of a forum within which petitioners can assert such rights.

QUESTIONS PRESENTED

The questions stated by petitioners (Petition, pp. 2-4) are inaccurate and redundant. Petitioners ignore the first question before this Court:

> 1. Whether the petitioners can properly raise for the first time in their petition for certiorari a question of procedural due process when that issue was available to them but not raised in the trial court, in the California Court of Appeal or on their petition to the California Supreme Court for a hearing?

The first five questions stated by petitioners should be restated as one:

> 2. Whether any substantial Federal question is presented by the decision of the California Court of Appeal declining, on the basis of facts disclosed by deposition, affidavits and admissions of record, to permit a class action when such an action would involve the litigation of separate questions by millions of members of the purported class and when the trial and appellate courts found that the action would impose an unjustified and intolerable burden upon the trial court and the parties?

We submit there is no basis in the decision of the court below or in the record for petitioners to even raise their purported questions 6 and 7 (Petition, p. 3). Petitioners advised that court, during oral argument, that they would not object to limiting the purported class to residents of California (Appendix to Petition, p. 6a) and the court assumed, for the purposes of its decision, that the as-

serted "exploitation" of a person's identity was actionable (Appendix to Petition, p. 4a).

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate and much of it is irrelevant to the questions sought to be raised. The basic facts are set forth in the opinion of the court below (Appendix to Petition, pp. 2a-3a).

On June 17, 1970, petitioners instituted an action on their own behalf and on behalf of all others similarly situated seeking damages and injunctive relief for the alleged use of their names and the names of the members of the purported class on mailings by respondents (CT 1-9).

Respondents filed special demurrers (CT 35-47) and a motion to strike the class allegation portions of the complaint (CT 48-51). Subsequently (three months after the filing of their complaint) petitioners moved for a preliminary injunction to enjoin respondents from (1) using the names of petitioners and of all members of the purported class and (2) altering, modifying or destroying records containing the names of all members of the purported class (CT 95-96). After evidence by affidavits and deposition was presented and the matter submitted at a hearing (RT 1-60), the trial court sustained the special demurrers in part, and struck the class-action allegations (Appendix to Petition, p. 8a). Petitioners' motion for a preliminary injunction was denied. The records containing the names of the members of the purported class were

no longer in existence at the time of the motion and petitioners declined a preliminary injunction for the protection of their individual names (Appendix to Petition, p. 9a).

The trial court found, on the basis of evidence presented to it by affidavits, deposition and admissions of record, that

> "the claim for relief consists of the aggregate of the claims of the individual members of the class, each one of which depends for its validity upon separate and unique facts. The result is that the major issues of basic liability and total damage cannot be determined without the appearance and separate proof of damages by each individual member of the class" (Appendix to Petition, p. 8a).

Petitioners at no time raised any issue of procedural due process before the trial court. They appealed from the decision of the trial court and again raised no issue of procedural due process.

The question of the right of the California court to pass on the rights of persons throughout the United States had been presented but not passed upon in the trial court (Appendix to Petition, pp. 8a-9a). In their oral argument on appeal petitioners conceded that, if they were permitted to proceed with a class action, they would limit the members of the class to California residents (Appendix to Petition, p. 6a).

The California Court of Appeal affirmed the trial court. It rejected an argument by petitioners that the class action was manageable on the theory that each of the persons petitioners purported to represent was entitled to

nominal damages. The court pointed out that even if each of those individuals was entitled to nominal damages, to award only nominal damages would limit the rights of the persons who may have been entitled to more than nominal damages:

> "[T]o award nominal damages, the court would be required to examine the mental and subjective state of each of the millions of plaintiffs, since in each case such individual appraisal is of the essence of the claim for damages and, indeed, of the cause of action" (Appendix to Petition, p. 6a).

Petitioners filed a petition for rehearing. The only reference to the United States Constitution mentioned in that petition was a description of the right of privacy as "guaranteed by the United States and California Constitutions" (Pet.Reh., p. 4)—a description which is consistent with the assumption by the court below that the unauthorized use of a person's name for commercial purposes is actionable (Appendix to Petition, p. 4a). When the petition for rehearing was denied, petitioners petitioned the California Supreme Court for a hearing. Again, the only reference to the United States Constitution in that petition was a reference to "the right of privacy guaranteed to individuals by the entire Bill of Rights in the Federal Constitution" (Pet.Hrg., p. 17).

ARGUMENT

I. THE FEDERAL QUESTIONS SOUGHT TO BE RAISED WERE NOT RAISED IN THE COURTS BELOW.

Petitioners did not raise any question of procedural due process in the trial court, in the California Court of Appeal or in the California Supreme Court.

Their purported excuse for failure properly to raise the Federal question in the state courts is an inaccurate assertion that the basis on which they claim a denial of procedural due process did not arise until the California Court of Appeal issued its opinion (Petition, p. 7). The trial court held that petitioners' action was not a proper class action because the issues could not be determined without separate proof of injury to individual members of the class (Appendix to Petition, p. 8a). This is precisely the ground upon which the Court of Appeal affirmed the trial court (Appendix to Petition, p. 6a) and it is the basis of petitioners' claim that they have been denied procedural due process. Under these circumstances, petitioners cannot raise the Federal question for the first time in this Court (*Whitney v. California* (1926) 274 U.S. 357, 362-363; *Cardinale v. Louisiana* (1969) 394 U.S. 437, 438-439; Stern and Gressman, Supreme Court Practice (4th Ed. 1969) § 3.27, pp. 125-126).

But, even assuming there were some colorable basis for petitioners' claim of surprise, they still cannot raise the issue for the first time in this Court. Petitioners had ample opportunity to assert their claim regarding procedural due process in their petition for rehearing in the California Court of Appeal and in their petition for hearing in the California Supreme Court. This they did

not do* and they cannot now raise it in this Court (see *Saunders v. Shaw* (1917) 244 U.S. 317; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951) § 78, pp. 134-135).

II. THE PETITION DOES NOT PRESENT ANY SUBSTANTIAL QUESTION OF DENIAL OF PROCEDURAL DUE PROCESS.

Point I of the petition (pp. 8-15) purports to raise questions of denial of procedural due process. Aside from the fact that these questions were not properly raised below, they present no substantial issue to this Court. The California courts merely held as a matter of state procedure that, regardless of the merit or lack of merit of petitioners' claims, their action was not a proper class action.

Petitioners cite no authority and we know of none that a hearing to determine the propriety of a class action cannot be based upon affidavits and depositions. The petitioners' quotation from *Boddie v. Connecticut* (1971) 401 U.S. 371, 377 (Petition, p. 11) does not suggest that a meaningful opportunity to be heard requires that every procedural determination be based upon a full trial.

The suggestion that "assumptions" by the California Court of Appeal foreclosed a meaningful hearing in a class action is not supported by the quotation (Petition, p. 11) out of context from the opinion below. The portion

*The only mention of the Constitution of the United States in either of petitioners' petitions below was a statement that the right of privacy is guaranteed by the United States Constitution (Pet.Reh., p. 4, Pet.Hrg., p. 17), a claim which is in no way inconsistent with the decisions of the California courts.

of the opinion from which that quotation was taken relates to the affirmance of the trial court's denial of a preliminary injunction. That affirmance was based on the fact that by the time the petitioners sought a preliminary injunction the names of the persons they purport to represent were no longer available and on the requirement that members of the class would have to be notified before their rights could be determined by the courts (Appendix to Petition, p. 7a). The court below simply did not agree with petitioners that everyone they purported to represent would or must concur with petitioners as to the nature of their interests or that those whose interests differed could have their rights arbitrarily limited.

Likewise, there is no basis for petitioners' assertions that the decision below denies petitioners access to the courts. The court below assumed, for purposes of determination of propriety of the class action, that each person petitioners purport to represent may have had a right to nominal damages. But as the court held, notice was necessary before their rights were limited to such damages. Petitioners' zeal to represent everyone does not justify sacrificing the rights of those persons who might claim more than nominal damages.

Access to the courts in accordance with California procedure is available to every member of the purported class; certainly there is no constitutional right to use the class action procedure regardless of the adverse consequences its use may have on the rights of the members of the purported class and on the maintenance of the court system.

III. NO CONSTITUTIONAL QUESTION AS TO THE NATURE OF THE RIGHT OF PRIVACY IS PRESENTED BY THIS CASE.

Point II of the petition (pp. 15-19) contains several quotations and citations discussing the nature of the right of privacy. We see no need to comment upon that material since nothing therein contained is inconsistent with the opinion of the California Court of Appeal which assumed that the "unauthorized use of one's name for commercial exploitation is actionable" (Appendix to Petition, p. 4a).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
April, 1973.

Respectfully submitted,
NOBLE K. GREGORY
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MICHAEL H. SALINSKY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1274

BRUCE W. STILSON and VALERIE STILSON, on behalf of themselves and all others similarly situated,

Petitioners,

versus

THE READER'S DIGEST ASSOCIATION, INC., a Delaware corporation, READER'S DIGEST SERVICES, INC., a Delaware corporation, READER'S DIGEST BOOKS, INC., a Delaware corporation and READER'S DIGEST SALES AND SERVICES, INC., a Delaware corporation,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA (FIRST APPELLATE DISTRICT)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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BRUCE W. STILSON and VALERIE STILSON, on behalf of themselves and all others similarly situated,

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA (FIRST APPELLATE DISTRICT)

1. The Questions Presented: The questions presented, as stated by Respondents, *assume the questions of fact and of law which are in issue.* Therefore, Respondents' "questions" are naturally self-answering in their favor.

Petitioners believe that the true questions presented were fairly stated in their Petition for Certiorari.

Petitioners stated, at oral argument before the California Court of Appeal, that if class manageability *became* a problem, the class *could* be limited to a manageable size by the court, for example, to only California residents. Petitioners were *foreclosed* from introducing evidence

regarding the manageability of the class because the trial court foreclosed discovery until after the hearing on Respondents' demurrers and motion to strike. Both the trial court and the appellate court accepted Respondents' statements of class size, which Petitioners were not allowed to question. Those *estimates* varied widely from time to time.

2. Respondents' Brief in Opposition says, in essence, "we did something wrong—i.e., we successfully invaded the Constitutional (as well as the common law and statutory) right of privacy of *millions* of persons—and *no one* (not even this Court) can either keep us from continuing (or repeating) the wrong we did, or take our wrongfully acquired gains out of our pockets". And, further, "we've been able to do this—and deny access to the courts to those wronged—because we destroy the records identifying the people we have wronged immediately after committing the wrong."

Inherent in this smugness and complacency is a dangerous legal lesson in terms of the United States Constitution and *due process*: if an entity is powerful enough and has equipment sophisticated enough to inflict millions of small wrongs, and extract a profit from the millions of small wrongs, it can keep the profit, continue the wrongs and stay beyond the reach of *all* legal procedures and sanctions, whether they spring from common law, state or Federal legislation, or the Constitution.

No meaningful relief can be had against the type of act that took place in this case *except* by class action. Relief for an individual is no relief and no deterrent. Only the prospect of class relief can sufficiently motivate the injured parties to act and the wrongdoer to respond.

Petitioners do not argue that a full trial is required to determine the propriety of a class action, but rather that an "evidentiary" hearing to determine that question, held

without allowing discovery, in a case where critical facts are in the sole possession of the defendant(s), is a *denial* of procedural due process. Petitioners objected to this procedure at every stage in the case (CT 82-83, 109-126; AOB 3-4, 13-15; Pet. Reh. 1-2; Pet. Hrg. 14-16).

3. Petitioners, at every stage, raised the substantive issue of a Constitutional right to personal privacy (CT 105, 103; Pet. Reh. 4; Pet. Hrg. 17-18). Curiously, Respondents do not contend that the right does not exist.

4. Respondents state, in their Brief in Opposition, that Petitioners claim "the right of privacy is guaranteed by the United States Constitution, a claim which is *in no way inconsistent with the decision of the California Courts*" (Brief in Opposition, p. 7). This statement is incredible. Petitioners' claim *must* be *"inconsistent"*, because the California courts, in the face of Petitioners' repeated claims for the right, failed to halt the wrong.

5. Petitioners, contrary to Respondents' statement, did *not* decline a preliminary injunction for the protection of their individual identities. This is the alleged waiver:

> THE COURT: I don't imagine that you'd be satisfied with a preliminary injunction that would prevent the Reader's Digest and its related companies from using your name in their future mail? So from the standpoint it's really the same consideration, isn't it?
>
> MR. STILSON: It is, but the right of the class to the injunction I think is critically important (RT 36).

6. There is a related case now pending before this Court involving some common facts, *Reader's Digest*

Assn., Inc. v. *State of Washington,* No. 72-1206 (opinion below, 81 Wash. 2d 259, 501 P. 2d 290), where *all* of a *Reader's Digest* "sweepstakes" scheme was held *unlawful* in the state of Washington, not just the narrow, but critical, issue of personal rights that this case presents.

7. If identification of each class member be deemed necessary (it would only be necessary at some time before judgment), the record clearly shows that the class criteria could be applied to the computer memory (e.g., Frankel Dep. 28, 55, 77), and such class members as could be identified could be located. Finally, Respondents' argument that an award of nominal damages would limit the rights of those "who might claim more" is specious. After proper notice (see, e.g., *Eisen* v. *Carlisle & Jacquelin,* 52 F. R. D. 253 (S. D. N. Y. 1971) those seeking more, different, or no relief could withdraw from the class and pursue their own remedies.

Petitioners believe that a review of the entire short record in this case, in context, and in chronological order, will support their contentions and will be more fruitful than considering the claims of either counsel as to what the record does or does not contain.

Respectfully submitted,

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